Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-974

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK, f/k/a
OHIO SAVINGS ASSOCIATION,

Petitioner,

v.

FRANCES HAMILTON,
BARBARA SEIDEL, and
GEORGE SEIDEL,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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39 pp

QUESTION PRESENTED FOR REVIEW

Is the equitable tolling doctrine applicable to the Truth in Lending Act's ("TILA's" or "the Act's") one-year statute of limitations where the Act's plain language, the congressional purpose underlying the Act, and the circumstances of the case at issue, *i.e.*, remaining factual issues as to whether the lender fraudulently concealed its TILA violations, all indicate that equitable tolling will serve the Act's remedial purpose?

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Robert E. Sweeney, counsel of record for Respondents Frances Hamilton, Barbara Seidel and George Seidel, hereby opposes the petition of Ohio Savings Bank, f/k/a Ohio Savings Association, for writ of certiorari to review the unanimous judgment of the Ohio Supreme Court entered on August 31, 1994.

RESPONDENTS' STATEMENT OF THE CASE

Respondents Frances Hamilton ("Hamilton") and Barbara and George Seidel ("the Seidels") are ordinary homeowners who took out 29-year fixed rate home mortgages with petitioner Ohio Savings Bank ("Ohio Savings"). The loans were executed in 1976 and 1977, respectively; all loan documents, including the federally mandated TILA disclosure forms, mortgage application, mortgage application acceptance, mortgage note, and consecutive monthly payment notices assured Hamilton and the Seidels (Hamilton and the Seidels also referred to as "Borrowers") that their home loans would amortize fully after 29 years of consecutive, defined monthly payments made at their respective, disclosed per annum interest rates.

In Fall 1984, approximately 8-9 years after consummation of the mortgage transactions, Borrowers discovered the following from a mathematician/economist:

(1) through its misuse of the 365/360 interest calculation method[1], Ohio Savings actually

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[1] The common interest calculation methods for residential mortgages are the 365/365 method and the 360/360 method. Both methods produce the same interest over a calendar year of 365 days. Only the 365/360 method used by Ohio Savings increases a mortgage's disclosed per annum interest rate by extracting an inflated interest charge. In the 365/360 method, the lender creates a hypothetical 360-day year, but charges interest for 365 days. Thus, the lender gains five days of extra interest yearly which compounds over the life of the loan. Comparing the two common methods and the 365/360 method demonstrates the mechanics of the added interest charge:

was charging Borrowers an additional .12% per annum interest beyond Borrowers' disclosed rates;

(2) Borrowers' loans would not amortize fully after 29 years of defined monthly payments at the stated per annum interest rate because Ohio Savings actually was servicing their loans on the basis of the 365/360 interest calculation method while promising Borrowers per annum rates, monthly payments and amortization by the 360/360 interest calculation method;

Interest on $100 for one year at 10%
Interest = time x rate of interest x principal:
365/365 method – 365/365 x 10% x $100 = $10
360/360 method – 360/360 x 10% x $100 = $10
365/360 method – 365/360 x 10% x $100 = $10.13

See, generally, Thorndike, *The Thorndike Encyclopedia of Banking and Financial Tables,* (1973) p. xiii and *American Timber and Trad. Co. v. First Nat. Bank of Oregon,* (C.A. 9, 1973), 511 F.2d 980, 981, n1.

The following calculation shows how Ohio Savings used the 365/360 method to inflate mortgagors' promised rates and extract 370 days' worth of interest from one calendar year:

365/360 x 365 days = 1.013 x 365 = 370 days.

Of the three interest calculation methods, only the 365/360 method can be manipulated to achieve undisclosed gain. Representative Wright Patman, then-Chair of the House Committee on Banking and Currency, described the 365/360 method as a "misleading and long-outdated practice for calculating interest rates which many have used to extract interest payments beyond what they state the interest rate is, and what they are entitled to." Patman Statement, Cong. Rec., July 24, 1972, p. 24,914.

(3) to retire their loans as promised at term end, Borrowers would need to make an undisclosed final balloon payment nearly 18 times greater than their respective defined, monthly payments.[2]

On January 30, 1985, Hamilton filed a class action complaint against Ohio Savings; three months later, an amended complaint added the Seidels. Borrowers alleged numerous causes of action against Ohio Savings, including breach of contract, fraud, unjust enrichment, and violations of the TILA. The TILA violations entailed the following nondisclosures and/or misrepresentations made by Ohio Savings on the disclosure form mandated by Regulation Z, promulgated under the TILA at 12 C.F.R. § 226:

(1) misrepresentation and understatement of the per annum contract interest rates;

(2) misrepresentation and understatement of the total of payments and total finance charges;

(3) failure to disclose to Borrowers that a balloon payment would be needed to retire the loans within their stated terms.

---

[2] Hamilton's loan was for $44,000; her defined monthly payment was $364.79; her disclosed rate was 9.25%; the undisclosed balloon payment needed to retire her loan at term end would be $6,493. Seidels' loan was for $32,400; their defined monthly payment was $262.76; their disclosed rate was 9%; the undisclosed balloon payment to retire their loan would be $4,702.34.

Borrowers presented evidence demonstrating that Ohio Savings used a series of misleading loan documents (mortgage application, mortgage acceptance, mortgage note, monthly statement, TILA disclosure form) in order to conceal or obfuscate its TILA violations. All documents bore the same misrepresentations as to Borrowers' per annum interest rates, defined monthly payments and amortization schedules, *i.e.*, full amortization promised after 29 years of consecutive monthly payments.

Borrowers also demonstrated that Ohio Savings presented them with a monthly statement that reiterated the misleading information given them when executing their loans. Indeed, mortgagors who checked their mortgage payments against a standard monthly table would find their payment accorded exactly with the per annum rate disclosed on all mortgage documents. Unbeknownst to Borrowers, Ohio Savings actually was extracting undisclosed, enhanced per annum interest of .12%. Since the monthly payments were based on the disclosed rates (*e.g.*, 9%), but Ohio Savings was amortizing the payments at a higher rate (*e.g.*, 9.12%), the loans, from inception, were out of sync. The amortization problem grew and compounded over the life of the loans. Ultimately, the problem prevents the loans from amortizing as promised.

Ohio Savings claimed the misrepresentations, nondisclosures and looming balloon payments were innocent "mistakes". However, discovery revealed that 2,700 existing mortgages had the same "mistakes". Thus, factual issues arose as to whether Ohio Savings had used different interest calculation methods and made misrepresentations to Borrowers, including those on the TILA form, in order to fraudulently conceal Borrowers' true mortgage

costs. Borrowers demonstrated the interest rate switch allowed Ohio Savings to hide its practice of extracting extra, undisclosed interest. Ohio Savings then could compete with other lenders by advertising one rate but surreptiously enhancing the stated rate. Borrowers demonstrated that the series of misleading loan documents, wherein Borrowers' disclosed payments were calculated with the 360/360 method, lulled Borrowers into believing that Ohio Savings was servicing their loans with the disclosed per annum interest rates, not rates .12% higher. Thus, Borrowers argued that Ohio Savings was able to conceal its TILA violations from them until the Act's one-year statute of limitations had expired or, in the alternative, that Ohio Savings committed the violations in a way that they concealed themselves.

Although lower Ohio courts dismissed Borrowers' claims on Ohio Savings' summary judgment motion, the Ohio Supreme Court unanimously reversed on all counts. Ohio Supreme Court decision, with attached Notice of Erratum, App. 1-9. The Ohio Supreme Court found Borrowers' TILA claims subject to equitable tolling on the basis of *Jones v. TransOhio Savings Association*, 747 F.2d 1037 (6th Cir. 1984) ("Jones"), which determined that the TILA's one-year statute of limitations may be equitably tolled to prevent unjust results in a particular case, *i.e.*, where "allegations of fraudulent concealment which by their very nature, and if true, [would] serve to make compliance with the limitations period imposed by Congress an impossibility." *Id.* at 1041. The Ohio Supreme Court relied on *Jones* and on Borrowers' evidence, which demonstrated that Ohio Savings' TILA violations were

fraudulently concealed, to support its decision to remand Borrowers' TILA claims to the factfinder.

REASONS FOR DENYING THE WRIT

The equitable tolling doctrine's long and venerable history favors its applicability under proper circumstances unless explicit statutory language and/or clear Congressional intent to the contrary appear. Ohio Savings asks this Court to grant its petition for writ of certiorari and to find that the equitable tolling doctrine does not apply to the TILA's one-year statute of limitations. The petition should be denied because this Court already has prescribed a clear analytical framework for courts to use when considering whether the doctrine should be applied. Courts are directed to determine if equitable tolling would promote the Congressional purpose behind the statute at issue. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965) ("Burnett"). In the within action, as discussed *infra*, Part II, the plain statutory language and the Congressional purpose of the TILA support applicability of equitable tolling.

Moreover, in rendering its decision, the Ohio Supreme Court conducted a thorough analysis of federal law on the applicability of the equitable tolling doctrine. The Ohio Supreme Court properly held that Borrowers' TILA claims were subject to equitable tolling. Since factual questions remained as to whether Borrowers could take advantage of this equitable doctrine, the Ohio high court reversed the summary dismissals by lower Ohio

courts and remanded to the trial court for further consistent proceedings.

Ohio Savings asks this Court to apply the analysis of *Lampf v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) ("Lampf"), an action brought under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b) and Securities Exchange Commission Rule 10(b)-5, 17 C.F.R. § 240.10b-5 (1990), to hold the equitable tolling doctrine inapplicable to TILA claims of these Borrowers. *Lampf*, however, is inappropriate and cannot provide the analytical model for considering application of the equitable tolling doctrine to this TILA action where Borrowers allege they could not reasonably discover Ohio Savings' fraudulently concealed TILA violations until 8-9 years after loan consummations. In *Lampf*, the § 10(b) provision at issue did not provide for private remedial action and did not contain its own statute of limitations. Since Congress had never expressed its own intent, this Court created both a private right and a statute of repose for actions commenced under § 10(b) and Rule 10(b)-5. In the instant cause, Congress crafted the TILA to allow enforcement through private party litigation. Congress indicated its intent to treat different types of TILA actions in different ways. Thus, Congress specified that TILA recission actions would be subject to a 3-year period of repose. Other private TILA actions would be governed by a one-year statute of limitations. TILA, 15 U.S.C. §§ 1635(f), 1640(e).

Ohio Savings claims that encouraging private enforcement of the TILA through application of the

equitable tolling doctrine does not effectuate the Congressional purpose underlying the Act. However, as set forth below, the Act's remedial intent and plain language mandate otherwise.

Accordingly, this Court should deny Ohio Savings' petition for certiorari of this matter.

I. THE EQUITABLE TOLLING DOCTRINE IS APPLICABLE TO TOLL THE STATUTE OF LIMITATIONS UNLESS CONGRESS STATES OTHERWISE.

Ohio Savings boldly asks this Court to find the equitable tolling doctrine inapplicable to the TILA's one-year statute of limitations. Such holding would depart from the historic practice of tolling a statute of limitations to prevent the basic injustice of allowing a wrongdoer to profit when the victim cannot reasonably discover the wrong until he/she is without remedy. "As a general rule, the doctrine of equitable tolling is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). As stated in *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 241 (2d Cir. 1962), cert. denied, 373 U.S. 909, 83 S.Ct. 1298, 10 L.Ed.2d 411 (1963): "The policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." Thus, this Supreme Court has repeatedly approved application of equitable tolling. *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874) (Bankruptcy Act of 1867); *Exploration Co., Ltd. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200 (1918) (Act of March 2, 1891, 26 Stat. 1093, to vacate land patents);

Holmberg v. Armbrecht, supra (Federal Farm Loan Act); *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959) (Federal Employers' Liability Act). *Cf. Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (Title VII time requirement for filing discrimination charge with Equal Employment Opportunity Commission held not to be jurisdictional requirement but, like a statute of limitations, subject to equitable tolling). Ohio Savings raises no argument sufficient to defeat application of the venerable equitable tolling doctrine to the instant case.

A. The United States Supreme Court Has Given Sufficient Instruction to Courts Considering Whether Application of the Equitable Tolling Doctrine Is Proper to Toll the Statute of Limitations in a Particular Case.

The Supreme Court has established an analytical framework for courts to use when considering applicability of the equitable tolling doctrine to toll a federal statute or limitations in a particular situation. *Burnett, supra*, 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941 instructs: "[T]he basic inquiry is whether the congressional purpose is effectuated by tolling the statute of limitations in given circumstances."

In the instant case, Ohio Savings asserts that the analysis used by this Court in *Lampf v. Gilbertson, supra*, should control its reasoning herein. However, the *Lampf* decision arose from a claim filed under § 10(b) of the Securities Exchange Act, *supra*, and Rule 10b-5 promulgated thereunder. In *Lampf*, this Court found Congress

had manifested its clear intent to deny applicability of the equitable tolling doctrine to federal securities claims. The *Lampf* Court found the Securities Exchange Act's one-and-three year limitations and periods were inconsistent with equitable tolling because the one-year period began after discovery of the facts constituting the violation, making tolling unneeded, and the three-year limit represented a period of repose, which the Court found incompatible with tolling. 501 U.S. at 363, 111 S.Ct. at 2782.

The instant claims arising under the TILA are easily distinguishable from those at issue in *Lampf*. Authorization of private claims under the TILA and under the Securities Exchange Act § 10(b) spring from critically and fundamentally different sources. Congress purposefully provided for private suits under the TILA through 15 U.S.C. § 1640(e), which provides:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Conversely, the texts of § 10(b) and Rule 10b-5 do not authorize private claims. Private § 10(b) claims arise via judicial creation as implied under the statute. *See Lampf, supra*, at 501 U.S. 358, 111 S.Ct. 2779, 2780, stating: "we have made no pretense that it was Congress' design to provide the [private] remedy afforded" and citing from

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976): "("[T]here is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy.") (footnotes omitted)". In *Lampf*, therefore, the provisions at issue contained no statute of limitations. This Court was asked to create an appropriate statute of limitations and then to determine whether the equitable tolling doctrine was applicable in actions under § 10(b) and Rule 10b-5.

By contrast, in the instant TILA action, Congress evidenced clear intent to put an absolute limitation on only one specific type of claim under the TILA, *i.e.*, claims for recission under 15 U.S.C. § 1635(f), which are barred after three years. Other claims are governed by 15 U.S.C. § 1640(e), *supra*, and by its one-year limitations period. Following *Lampf*'s reasoning that a period of repose is inconsistent with equitable tolling, *Lampf, supra*, 501 U.S. at 363, 111 S.Ct. at 2782, Ohio Savings might argue that TILA private claims seeking recission may not benefit from the equitable tolling doctrine. However, since the instant claims are not for recission, this action under TILA § 1640(e) must be interpreted in light of both the general rule of *Holmberg v. Ambrecht, supra*, 327 U.S. at 397, 66 S.Ct. at 585, 980 L.Ed.743, ("equitable tolling is read into every federal statute of limitations") and the directive of *Burnett, supra*, 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941 (courts to ask whether equitable tolling will effectuate Congressional purpose in a given case).

Courts considering applicability of the equitable tolling doctrine need no additional instruction beyond that given in *Burnett, supra. Burnett* directs that determination of applicability of the equitable tolling doctrine requires

consideration of the statutory purpose in light of the particular circumstances of the case at issue. Flexibility is required in such a fact-oriented analysis. *See King v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986) ("King"), holding (1) that the one-year statute of limitations for Borrowers' TILA action against a lender for failure to make material disclosures may be equitably tolled in proper case and (2) issues of lender's alleged fraudulent concealment and whether equitable tolling is proper require evaluation of specific claims and "involve factual determinations". *Ibid.*

Accordingly, this Court must refuse Ohio Savings' petition to find the *Lampf* analysis suitable for the within case. In *Burnett, supra*, this Court already has given guidance and needed flexibility to courts considering applicability of the equitable tolling doctrine.

B. In the Instant Case, the Ohio Supreme Court Correctly Applied the Proper Test to Determine that the Equitable Tolling Doctrine Is Applicable to Toll the Statute of Limitations in an Action Wherein Home Mortgagors Alleged Their Mortgage Lender Fraudulently Concealed Its Violations of the Truth In Lending Act ("TILA" or "the Act").

In the instant case, the Ohio Supreme Court referred directly to federal law developed in *Jones, supra*, and *King, supra*, in holding that the TILA's one-year statute of limitations was subject to the equitable tolling doctrine in a proper case, if tolling effectuated Congress' purpose. The Ohio court determined that purpose was to provide a

meaningful disclosure of credit costs and to prevent divergent and/or fraudulent lending practices. App. 5, 6. The Ohio court found tolling in this case would further the declared Congressional purpose. It directed that remaining factual questions be remanded to the trial court as to when Borrowers reasonably could have discovered Ohio Savings' TILA violations and as to whether they asserted their claims within one year from that date. *See* Rule 56 of Ohio Rules of Civil Procedure (construing evidence in light most favorable to the nonmovant, summary judgment not proper when genuine issues of material fact remain).

Ohio Savings vainly asserts that Ohio's high court "misinterpreted Congressional intent" in allowing litigation of Borrowers' TILA claims. Ohio Savings groundlessly claims that the Ohio Supreme Court's holding[3] would render the Act's statute of limitations meaningless. Petition 19. Ohio Savings' argument must fail, for the Ohio Supreme Court based its decision squarely on *Jones, supra,* which authorizes application of the equitable tolling doctrine to those violations and nondisclosures that have an element of purposeful concealment. 747 F.2d at 1041. Borrowers have set forth evidence establishing Ohio Savings fraudulently concealed its TILA violations.

The Ohio Supreme Court applied the proper analysis to hold the equitable tolling doctrine applicable to toll the

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[3] The Ohio Supreme Court held "[T]he time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosure that formed the basis of their Truth in Lending action". App. 6.

one-year statute of limitations governing Borrowers' TILA Claims. As set forth below, numerous federal decisions, including *Jones* and *King*, analyzed and provided the Congressional purpose behind the TILA and provide sound foundation for the Ohio Supreme Court's decision.

II. THE PLAIN LANGUAGE AND THE CONGRESSIONAL PURPOSE OF THE TILA INDICATE THAT ITS ONE-YEAR STATUTE OF LIMITATIONS CAN BE EQUITABLY TOLLED IN A PROPER CASE.

The two-fold Congressional purpose behind the TILA is facilitating consumers' acquisition of the best credit terms and protecting consumers from divergent and/or fraudulent practices stemming from uninformed use of credit. *Jones, supra,* at 1040. The purpose of the TILA is set forth at 15 U.S.C. § 1601:

> § 1601. Congressional findings and declaration of purpose
>
> (a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .

In *Mourning Family Publications Service, Inc.*, 411 U.S. 356, 363, 93 S.Ct. 1652, 1657, 36 L.Ed.2d 318 (1973)

("Mourning"), this Court studied the legislative history of the TILA and noted that Congressional hearings revealed consumers often remained ignorant of the nature of their credit obligations and the cost of deferring payment. *Mourning, supra,* citing Congressional history at H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong. 1st Sess., 1-2 (1967). The Court noted that to accomplish its consumer oriented goal for the TILA, Congress "determined to lay the structure of the Act broadly." 411 U.S. at 365, 93 S.Ct. at 1658, 36 L.Ed.2d 318.

Lower courts called upon to determine whether the TILA's one-year statute of limitations was subject to equitable tolling uniformly agreed that the Congressional intent and the declared purpose behind the TILA mandated equitable tolling in the proper case to effectuate the Act's purposes.

A. The Remedial Purpose of the TILA Authorizes Application of the Equitable Tolling Doctrine to the Act's One-Year Statute of Limitations.

The declared purpose of the TILA, 15 U.S.C. § 1601, *supra,* leaves no doubt that the Act is remedial consumer legislation. All courts have so interpreted. *See Mourning, supra,* 411 U.S. at 363, 93 S.Ct. at 1657, 36 L.Ed.2d 318 (1973) (citing legislative history); *Jones, supra,* at 1037, 1040; *Bizier v. Globe Financial Services, Inc.,* 654 F.2d 1, 3 (1st Cir. 1981) ("Bizier"); *James v. Home Construction Co. of Mobile, Inc.,* 621 F.2d 727, 729 (5th Cir. 1980); *Johnson v. McCrackin - Sturman Ford, Inc.,* 527 F.2d 257, 262 (3d Cir. 1975); *Eby v. Reb Realty, Inc.,* 495 F.2d 646, 650 (9th Cir. 1974); *N.C. Freed Co., Inc. v. Board of Governors of Federal*

Reserve System, 473 F.2d 1210, 1214 (2d Cir.), cert. denied, 414 U.S. 827, 94 S.Ct. 48, 38 L.Ed.2d 61 (1973). *Mourning, supra*, 411 U.S. at 377, 93 S.Ct. at 1664, 36 L.Ed.2d 318 announced: "The Truth in Lending Act reflects a transition in Congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose'." *Jones, supra*, at 1040 cited *Mourning, supra*, and stated "TILA's purpose is twofold: to facilitate the consumer's acquisition of the best credit terms available; and to protect the consumer from divergent and at times fraudulent practices stemming from the uninformed use of credit."

Many courts have noted that the TILA's remedial purpose is expressed through Congress' desire "to create a system of private attorney generals to aid its enforcement". *Jones, supra*, at 1040, citing to *Bizier, supra*, and *McGowan v. King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978). *Bizier* specifically tied the TILA's purpose and philosophy to Congressional intent to grant private claimants enforcement capability:

> . . . Congress sought in the act to vest considerable enforcement power in "private attorney general" individual borrowers who, by suing lenders for alleged violations, could achieve widespread compliance without government intervention.

Id. at 2. (Cites omitted.)

Courts uniformly have declared that this remedial act must be liberally construed in favor of the consumer. *King, supra*, at 915; *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 70-71 (9th Cir. 1980); *Jones, supra*, at 1040, and *Bizier, supra*, at 3 (" . . . as courts have consistently recognized, the act is intended to balance scales

thought to be weighed in favor of lenders and is thus to be liberally construed in favor of borrowers.") *Jones, supra,* forcefully described judicial commitment to the equitable tolling doctrine to toll the one-year statute of limitations in a TILA claim:

> . . . Only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing allegations of fraudulent concealment which by their very nature, and if true, serve to make compliance with the limitations period imposed by Congress an impossibility.
>
> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Jones, supra, at 1041, citing *Bailey v. Glover, supra.*

Ohio Savings attempts to show that the equitable tolling doctrine is not applicable herein. Ohio Savings claims Borrowers can gain relief through actions unaffected by the Act's one-year statute of limitations, *i.e.,* through pursuing common law claims of fraud, breach of contract, etc. and/or through restitution via administrative enforcement. Petition 10, 11. The argument must fail. Rights under federal statutes cannot be voided merely because a litigant possesses concurrent common law remedies. Moreover, Ohio Savings claims that lenders will never be allowed to benefit from their TILA violations because a borrower may raise the violation at any time in defense of set-off or recoupment to

lender's action to collect the debt. 15 U.S.C. § 1640(e). Petition 9. This argument must fail, also. It unlawfully limits borrowers from pursuing TILA remedies until *after* a lender initiates a collection action.

The evidence has shown that Ohio Savings did benefit from its violation of the TILA. Ohio Savings has admitted that 2,700 existing loans, as distinct from loans retired through home sale, refinancing or foreclosure, suffer from the same amortization problem as loans to Borrowers Hamilton and Seidel. As calculated by Ohio Savings itself, Seidels' balloon payment to retire their mortgage would be $4,702.34. If only 2,700 existing loans were involved, Ohio Savings could realize a windfall of multi-million dollar magnitude. Allowing the equitable tolling doctrine to toll the Act's one-year limitation in this case is the only way to effectuate Congressional purpose. As stated in *Jones, supra,* at 1040: "Congress never intended to facilitate fraudulent practices of lenders by making it difficult for borrowers even to assert their claims."

Ohio Savings argues that the Ohio Supreme Court's opinion would permit equitable tolling where TILA violations exist but intentional concealment is lacking. The bank's argument is intended to demonstrate that the Ohio Supreme Court's opinion is out of step with the analysis of *Jones, supra, Lynch v. Signal Financial Co. of Quincy,* 327 N.E.2d 732, 735 (Mass. 1975), and *Hughes v. Cardinal Fed. Sav. & Loan Ass'n,* 556 F. Supp. 834, 838 (S.D. Ohio, 1983). Petition 18-22. Ohio Savings tries to seek shelter behind the general argument, inapplicable to these facts, that it is unfair to permit suspension of the limitations provision where a lender's inequitable conduct, such as fraud or concealment, is lacking.

These arguments are not persuasive in this case. In this action, Borrowers presented ample evidence that Ohio Savings violated the TILA and used misleading non-TILA documents to obfuscate and hide its TILA violations. Much more than mere TILA violations existed here. Ohio Savings' violations were obscured with gross untruths about the Borrowers' interest rates, payment terms and amortization schedules.

The Supreme Court of Ohio did not endorse a position that would permit equitable tolling of the TILA statute of limitations where evidence of inequitable conduct was lacking. The Ohio court specifically indicated that it was adopting the approach set forth in *Jones, supra.* Under *Jones*, "[f]or application of the doctrine of fraudulent concealment, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover *the fraud* involving the complained of TILA violation." (Emphasis added.) *Jones, supra,* at 1041. The Ohio Supreme Court's clear adoption of the *Jones* approach refutes the assertion that the court intended to create a novel or unfair approach.

B. The Ohio Supreme Court Properly Determined the Equitable Tolling Doctrine to Be Applicable to Borrowers' TILA Claims Because Borrowers Raised Factual Issues Regarding Ohio Savings' Fraudulent Concealment of Its TILA Violations or, in the Alternative, Regarding Ohio Savings' Committing TILA Violations in a Manner That They Concealed Themselves.

The Ohio Supreme Court's decision regarding applicability of the equitable tolling doctrine to Borrowers'

TILA claims derived from its own analysis of the TILA's purpose, from reliance on federal law and from the factual issues in this particular case. App. 5, 6. The Ohio court followed the directives of *Jones, supra,* and *King, supra,* in construing the TILA's one-year statute of limitations liberally, in favor of Borrowers, and with deference to the fact that Congress never manifested clear intent to deny the equitable tolling doctrine to private claims arising under the TILA, § 1640(e). *Jones, supra,* at 1041.

As discussed, *supra,* Borrowers presented evidence demonstrating that Ohio Savings' TILA violations involved fraudulent nondisclosures. The Ohio high court specifically adopted *Jones, supra,* at 1041 ("allegations of fraudulent concealment which by their very nature, and if true, [would] serve to make compliance with the limitations period . . . an impossibility") and determined that evidence as to fraudulent concealment of TILA violations would give Borrowers the benefit of the equitable tolling doctrine. App. 6. The Ohio Supreme Court instructed the factfinder to determine when Borrowers reasonably could have discovered the fraudulent and/or concealed nondisclosures and if Borrowers acted within one year from such date.

Borrowers' demonstration of acts of fraudulent concealment, the Ohio Supreme Court's deference to the declared purpose of the TILA, *supra,* § 1601(a), and the Ohio court's clear reliance on *Jones, supra,* for its analysis of the applicability of the equitable tolling doctrine demonstrate that the Ohio court's decision was properly and narrowly tailored to the particular circumstances of the

instant case. *See Burnett, supra,* 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941.

CONCLUSION

The venerable history of the equitable tolling doctrine instructs that, without a clear Congressional mandate to the contrary, the equitable tolling doctrine is read into every statute of limitations. The U.S. Supreme Court has given clear directive to courts considering the doctrine's application in a particular case. Courts are instructed to consider if tolling the statute of limitations will effectuate Congressional intent under the circumstances at issue. Some flexibility is required in the ensuing factual analysis.

After consideration of both the Congressional purpose behind the TILA and federal law authorizing application of the equitable tolling doctrine to toll the Act's one-year statute of limitations for private actions in a proper case, the Ohio Supreme Court properly and unanimously applied this equitable doctrine to Borrowers claims against Petitioner Ohio Savings.

Accordingly, Ohio Savings' Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX

HAMILTON ET AL., APPELLANTS, *v.* OHIO SAVINGS BANK, F.K.A. OHIO SAVINGS ASSOCIATION, APPELLEE.

[Cite as *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137.]

Banks – Residential mortgages – Banks method of interest calculation results in incomplete amortization of mortgage within the stated term – Federal Truth in Lending Act violation alleged – Section 1640(e), Title 15, U.S. Code, construed and applied – Statute of limitations tolled until mortgagor discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for the Truth in Lending action.

(No. 92-2302 – Submitted April 26, 1994 – Decided August 31, 1994.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 61908.

Plaintiffs-appellants, Frances E. Hamilton, Barbara A. Seidel and George L. Seidel, obtained residential mortgages from defendant-appellee, Ohio Savings Bank, formerly known as Ohio Savings Association ("Ohio Savings"). Hamilton's mortgage was for the principal sum of $44,000 and was to be payable in consecutive monthly installments of $364.79 with the "remaining balance, of principal and interest, if any," payable at the end of the twenty-nine-year mortgage term. The stated interest rate was 9.25 percent. The Seidel mortgage secured a principal amount of $32,400 with monthly payments of $262.76 over a period of twenty-nine years. Its stated interest rate was nine percent per annum. The Hamilton

mortgage was executed in September 1976 and the Seidel mortgage was signed in August 1977.

Both mortgages contained the following language regarding interest calculation:

"Such interest shall be computed monthly by (i) obtaining a daily interest factor based upon a 360-day year, (ii) multiplying such factor by the actual number of days in each calendar month, and (iii) applying the result against the unpaid balance of this note outstanding on the last day of each month."

"Regulation Z" consumer disclosure notices, pursuant to Section 226.1 *et seq.*, Title 12, C.F.R., were provided to both mortgagors. The record contains two different Hamilton Regulation Z forms. One is attached to the appellee's motion for summary judgment and is entitled "Joint Appendix Exhibit 'E' ". On this form a typewritten notation was included that stated "THE CONTRACT INTEREST RATE IS 9.25% (365/360 method)." The second Regulation Z form is attached as plaintiff's Exnibit 4 to the deposition of Judy Ledin. The same typewritten language is included but it would appear that the "365/360" language was altered to read "360/360." Given the state of these documents, it is difficult to ascertain exactly what was done. The Seidel Regulation Z form does not indicate how interest will be calculated.

Ultimately, another Ohio Savings mortgagor, John P. Clark, who holds degrees in both mathematics and economics, discovered that when the 365/360 method of interest calculation is used, the stated interest rate was less than that actually charged and paid to the bank.

Based on this theory, the appellants claim that the actual rate of interest on the Hamilton note became 9.37 percent rather than 9.25 percent, and on the Seidel note, 9.12 percent rather than nine percent. Additionally, because the bank had based the monthly payment on a 365/360 calculation, both notes carried monthly payments that were insufficient to fully amortize the principal over the term of the loan. According to appellants, this will result in outstanding balances at the end of the twenty-nine-year term on both notes, necessitating final payments of $6,493 of the Hamilton note and $4,702.34 on the Seidel note.

Hamilton and the Seidels filed suit on their own behalf and all others similarly situated, claiming violations of the federal Truth in Lending Act, Section 1601 *et seq.*, Title 15, U.S.Code, as well as common-law claims of fraud, unjust enrichment, conversion and breach of contract. After protracted litigation, appellee moved for summary judgment. The bank argued that the 365/360 method of interest calculation was legal and fully disclosed; the understated monthly payment was a mistake by the bank that actually inured to the benefit of appellants by understating their monthly payments by roughly $3 or $4; and the appellants' actions were time-barred. The trial court granted summary judgment for the bank and the court of appeals affirmed, holding, *inter alia*, that appellants' Truth in Lending claims were barred by the one-year statute of limitations found in Section 1640(e), Title 15, U.S.Code.

The matter is now before this court upon the allowance of a motion to certify the record.

Robert E. Sweeney Co., L.P.A. Robert E. Sweeney, Mark Wintering, Kevin E. McDermott and *J. William Petro; Weiss, Kwait & Associates* and *Steven M. Weiss,* for appellants.

Arter & Hadden, Hugh M. Stanley, Jr., Irene C. Keyse-Walker and *Beth Whitmore; Marc W. Freimuth* and *Roy E. Lachman,* for appellee.

Kristen E. Manos, urging reversal for *amici curiae,* United States Public Interest Research Group, Ohio Public Interest Research Group, and Consumer Federation of America.

MOYER, C.J. The threshold issue is whether appellants' claims are time-barred, thereby divesting the trial court of subject matter jurisdiction. Section 1640(e), Title 15, U.S.Code provides: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. * * * "

The determinative question is what is meant by "occurrence of the violation." There is a divergence of views among the federal courts regarding the application of that phrase. At least three approaches have been used to determine when the statutory period commences. The first maintains that Congress clearly intended that the statute of limitations begins to run at the execution of the contract and should be strictly enforced. *Stevens v. Rock Springs Natl. Bank* (C.A. 10, 1974), 497 F.2d 307. The second view is based on the notion that nondisclosure of the actual interest rates represents a continuing violation

of the contract and the limitations period should be fluid and liberally applied. *See Postow v. OBA Fed. S. & L. Assn.* (C.A.D.C. 1980), 627 F.2d 1370 (adopting "continuing violation" theory in limited situations). The final theory is that offered by the Sixth Circuit in *Jones v. TransOhio Savings Assn.* (C.A.6, 1984), 747 F.2d 1037. The *Jones* court reasoned that to strictly enforce the one-year statute of limitations would run counter to the expressed purpose of the Act and its remedial nature. Therefore, the court held that under certain circumstances the statute might equitably be tolled. See, also, *King v. California* (C.A.9, 1986), 784 F.2d 910 (expressly adopting the Sixth Circuit's reasoning).

We adopt the third application of the statute because under the appropriate circumstances, tolling the statue [sic] of limitations will effectuate the purpose of Congress in adopting the Truth in Lending Act. Section 1601(a), Title 15, U.S.Code provides: " * * * It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."

The Act was designed as a consumer protection statute aimed at permitting informed choices and guarding against divergent and possibly fraudulent practices. *King, supra,* 784 F.2d at 915. Its provisions are remedial in nature and should be liberally construed. *Jones, supra,* 747 F.2d at 1040. As stated by the Sixth Circuit: " * * * Only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing

allegations of fraudulent concealment which by their very nature, and if true, serve to make compliance with the limitations period imposed by Congress an impossibility." *Id.* at 1041.

Therefore, we conclude that in the case before us, the statute of limitations began to run at the time the mortgages were executed. However, the time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for their Truth in Lending action. This determination necessarily involves questions of fact that preclude summary judgment. On remand, the trial court should determine when the appellants could reasonably have discovered the divergent terms of the mortgage, note and disclosure forms, and whether they filed this action within one year from that date.

As to appellants' common-law claims, we are likewise persuaded that summary judgment was inappropriate. The record is contradictory as to what was disclosed to whom. On one document, the 365/360 method is disclosed; on another it is not. Summary judgment may not be granted when reasonable minds could come to differing conclusions. Civ.R. 56(C). Whether the method of interest calculation and the incomplete amortization of the loan within the stated term were disclosed is a question of fact. Whether these items amounted to misrepresentations fraudulent conduct, or merely harmless mistakes, is also an issue best left to the finder of fact, thereby precluding summary judgment.

For the foregoing reasons, the judgment of the court of appeals is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

A.W. SWEENEY, DOUGLAS, WRIGHT, RESNICK WOLFF and PFEIFER, JJ., concur.

WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for F.E. SWEENEY, J.

OHIO OFFICIAL REPORTS

October 10, 1994 No. 41

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ISSN 0744-9607

NOTICE OF ERRATUM

On page 138 of *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137, "360/360 calculation" should replace "365/360 calculation" in the first paragraph, third sentence.